United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,689

JAMES H. KING, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court

for the District of Columbia

EUGENE EBERT

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Attorney for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

1. Whether or not a jury that has rendered a verdict of not guilty, been discharged by the Court, and left the courtroom can be recalled and permitted to render a second verdict of guilty of a lesser included offense.

2. Whether or not a complaining witness can be interrogated by the defense on cross-examination regarding his refusal to discuss the alleged crime with defendants' counsel.

3. Whether or not the Court prejudiced appellant by criticizing defense counsel's questions on voir dire, interrupting opening argument, setting limitation on conversations that could be elicited from witnesses, lecturing to counsel on legal ethics, and specific reference in closing instructions to possible impropriety.

I N D E X

TABLE OF CASES

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*Authorities chiefly relied upon are marked by astericks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES H. KING,	:	
Appellant	:	
v.	:	No. 19,689
UNITED STATES OF AMERICA,	:	
Appellee	:	

BRIEF OF APPELLANT

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

II. STATEMENT OF THE CASE

Appellant, James H. King, was tried along with the codefendant, William McCorkle, under a single count indictment charging him with robbery. The appellant and codefendant were charged with stealing a wallet, money and a blackjack from Ronald T. Wilkins, an undercover policeman with the Metropolitan Police Department.

Officer Wilkins testified that he met the appellant and codefendant during the early morning hours of November 24, 1964, in the course of his investigation of establishments selling whiskey without licenses. (Tr. 26-28). Officer Wilkins testified that he

accompanied the appellant, the codefendant and a third person to the basement of a house where the robbery was alleged to have occurred. (Tr. 28). Officer Wilkins testified that a fight started during the course of a conversation after one of the parties had mistakenly thought that he had made an unflattering statement about the race of the other parties. (Tr. 31, 58, 59). The officer testified that as a result of being struck by the others he was rendered unconscious, and that when he regained consciousness the other persons were gone as were his wallet, money and blackjack. (Tr. 32).

The appellant testified that he had not robbed or assaulted the officer, nor had the others. (Tr. 123, 124). It was the appellant's contention that Officer Wilkins had engaged in a fight with the codefendant after an exchange of heated remarks. (Tr. 118). The appellant further stated that the officer had started the fight. (Tr. 119).

During the cross-examination of Officer Wilkins, appellant sought to elicit his refusal to discuss the alleged crime with appellant's counsel prior to the trial. (Tr. 60-62). This testimony was sought for the purpoee of impeaching the complainant's credibility. (Tr. 60-62). The Court excluded the question over the objection of appellant. (Tr. 61, 62).

On voir dire, the Court indicated its displeasure with a question requested regarding the weight to be given to the

testimony of a defendant as compared to a police officer. The Court refused the question as finally posed. (Tr. 6-8).

The Court responded to the proposed question, "Would any member of the jury be prejudiced by the fact that the complaining witness is white and the defendants are Negro," by threatening to dismiss counsel from the case and declare a mistrial. (Tr. 8).

During the appellant's opening argument, the Court interrupted and reprimanded counsel for quoting certain conversations alleged to have percipitated the fight. (Tr. 19, 20). Subsequently, the Court lectured counsel on their duties as defense counsel, and inferred that they had attempted to inject a racial issue into the trial. (Tr. 42-51). The Court in its final instructions to the jury indicated that the racial issue had crept into the trial. (Tr. 189).

At the conclusion of the trial, the jury was instructed on the offense of robbery and the lesser included offense of simple assault. (Tr. 195-200.) After deliberation, the jury found the appellant and codefendant not guilty of robbery. (Tr. 205). The jury was then dismissed summarily by the Court. (Tr. 205). The appellant and codefendant then left the courtroom as did the jury. The Court then called the next case on the calendar. At this point, the Assistant United States Attorney suggested to the Court that the jury had not reported their complete verdict. (Tr. 205-206). After approximately 10 to 15 minutes, the appellant, codefendant

and the jury returned to the courtroom. (Tr. 207). The Court called the roll of the jury and requested that the jury repeat their verdict. The foreman of the jury stated the verdict was not guilty of robbery as to both the appellant and codefendant, but guilty of simple assault as to both appellant and codefendant. The jury was then polled and its verdict was affirmed. (Tr. 207-208). This time the Court graciously dismissed the jury. (Tr. 208-209).

The appellant and codefendant on April 19, 1965, filed a motion for judgment of acquittal and in the alternative for arrest of judgment based on the arguments submitted herein. Supplemental points and authorities in support of the motion were also filed. The Court on May 24, 1965, denied the motion. (Tr. 2, Vol. 3). On May 24, 1965, the Court entered the judgment of conviction and placed the appellant on probation for one year and suspended the imposition of sentence. (Tr. 4, Vol. 3).

Subsequently, the appellant sought leave of the trial court to proceed on appeal in forma pauperis. This was denied by the trial court in its Memorandum on July 9, 1965. This Court granted appellant's petition for leave to appeal in forma pauperis by Order dated September 16, 1965.

III. STATUTE INVOLVED

Title 18, Appendix, United States Code, Rules Of Criminal Procedure, Rule 31 (d), provides:

> Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon

the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

IV. STATEMENT OF POINTS

1. The District Court erred in permitting the jury after their finding of not guilty and their discharge to reassemble and return a second verdict of guilty of simple assault.

2. The District Court erred in not permitting appellant to cross-examine the complainant regarding his refusal to discuss the alleged crime prior to trial with appellant's counsel.

3. The District Court erred in injecting itself into the trial of the case by interrupting appellant's counsel in opening argument, by threatening to dismiss appellant's counsel, by lecturing to counsel on legal ethics, and by inferring that counsel had acted improperly.

V. SUMMARY OF ARGUMENT

1. At the conclusion of the trial, the jury returned a verdict of not guilty as to the appellant for the robbery charged, and was discharged by the Court. When the jury and the appellant left the courtroom, the Court no longer had jurisdiction over either the appellant or the jury. The jury had been formally discharged and their verdict had been recorded. Their status as an

arm of the Court had ceased. The Court could not recall them, re-examine them, or obtain a new and different verdict. The Court could have refused to accept the jury's verdict at the time it was rendered because of doubt as to its clarity, meaning, or completeness. It could have then examined and polled the jury to clear up the doubt. However, once the verdict was announced by the jury, and accepted and recorded by the Court, and the jury was discharged, the verdict was final as to its meaning and effect. The appellant was also beyond the jurisdiction of the Court when the jury rendered a verdict of not guilty, and the appellant and jury left the courtroom. The Court had no authority to require appellant to again appear before it.

2. Appellant's counsel should have been permitted in cross-examination to question the complaining witness, a police officer, regarding his refusal to discuss the alleged crime with defense counsel. The Court's refusal to permit counsel to elicit from the complaining witness the fact that he refused to discuss the offense precluded the jury from receiving evidence as to the complainant's credibility. The testimony was sought only for impeachment purposes.

3. The Court's interruption of appellant's opening argument and innuendo of impropriety were unwarranted. During voir dire, the Court threatened to dismiss counsel from the case for

requesting a question approved by the Supreme Court of the United States. The Court imposed restrictions on the testimony that could be elicited regarding the alleged assault. The Court in injecting itself into the case became an interested and non-objective participant in the proceedings. This was detrimental to the appellant's defense and limited the appellant in demonstrating to the jury that there was no assault but merely a fight initiated by the complaining witness.

VI. ARGUMENT

1. The Jury Once Discharged Could Not Be Reassembled To Return A Second Verdict.

With respect to Point 1, appellant desires the Court to read the following pages of the transcript: Tr. 204-209, inclusive.

The factual situation appears to be one of first impression in this Court. The trial court had clearly accepted the verdict, discharged the jury, and the defendant was free to leave the courthouse. Subsequently, at the request of the Assistant United States Attorney the jury was reassembled. The record clearly demonstrates that the jury and the appellant had left the courtroom.

Rule 31 (d) of the Federal Rules of Criminal Procedure provides that a jury may be polled before its verdict is accepted and recorded. This clearly indicates that once the verdict is returned and recorded, the jury cannot be polled as it was in the

present case.

In the case of Miranda v. United States, 255 F. 2d 9 (P.R. 1958), the trial court received and recorded a verdict from the jury and the defendant immediately asked to poll the jury. The court refused the request since the jury verdict had been recorded. On appeal the appellate court held that the defendant had not been given the opportunity to poll the jury. In the Miranda case the jury at all times remained in the jury box. Had the jury been discharged, it appears that the trial court would have been sustained on appeal. In the case at bar, the jury was polled improperly, after being discharged and dispersed.

It is generally held that after a jury has been permanently discharged from a case, it cannot be reassembled to amend or correct its verdict in matters of substance. See State v. Dawkins, 32 S.C. 17, 10 S.E. 722 (1890).

There are a long line of cases that hold that after a jury renders a verdict and is dismissed, there is no authority by which they can be reempaneled and under further instructions be called upon to render a new and different verdict. See Yonker v. Grimm, 101 W.Va. 711, 133 S.E. 695 (1926); Ellis v. State, 27 Tex. App. 190, 11 S.E. 111 (1889).

The jury may be reassembled after discharge to amend a verdict when the jury has not left the courtroom and the defect is a matter of form only. Cunningham v. State, 14 Ala. App. 1, 69 So. 982 (1915). In the case of Brister v. State, 26 Ala. 107, (1855),

the verdict of guilty in a murder trial was read but before the jury had left the bar, it was discovered that the defendant was not present. The trial court in this case permitted the jury to render a second verdict which was affirmed on appeal.

A case similar in point to the case at bar is Melton v. Commonwealth, 132 Va. 703, 111 S.E. 291 (1922). The defendant was found guilty of rape and sentenced to three years imprisonment. The jury was dismissed and returned with the sheriff to the jury room for their jury fee. The court called back the jury because the sentence was in error since the minimum sentence for the offense was five years. The jury was permitted to redeliberate and return a second verdict with a five year sentence. On appeal, the appellate court reversed and stated the following:

> So long as the whole jury are in the actual and visual presence of the court, and under its control, an inadvertent announcement of their discharge may be recalled as a matter still in the breast of the court, but not thereafter. When the court announces their discharge, and they leave the presence of the court their functions as jurors have ended, and neither with nor without the consent of the court can they amend or alter their verdict. The sanctity of the jury trials cannot be thus subjected to the hazard of suspicion. (Emphasis added).

In the case before this Court, the jury was clearly not within the breast of the court after they left the courtroom.

It seems to be well settled in federal district courts that in the case of an inadvertent mistake, the court has the power

In the present case the jury had left the courtroom. Thus, the jury had ceased to be a unit. When the trial court recalled the jury, they had no authority to announce their verdict a second time. Their status had ended and they were merely fellow citizens. The appellant's status as an accused had also ended when the trial court discharged the jury and the appellant left the courtroom a free man. To hold otherwise would subject the court to the hazard of suspicion.

2. Appellant Should Have Been Permitted To Cross-Examine Complainant Regarding His Refusal To Discuss The Alleged Offense With Defense Counsel.

With respect to Point 2, appellant desires the Court to read the following pages of the transcript: Tr. 60-62, inclusive.

Appellant's defense was based on the contention that the complainant had merely been in a fight with the codefendant which the complainant had provoked. Through cross-examination of the officer the appellant was attempting to impeach his credibility and demonstrate his bias by showing his refusal to discuss the alleged crime with defense counsel.

Great latitude is allowed in cross-examination of a witness for the prosecution for the purpose of impeaching his credibility and showing bias. As a general rule, cross-examination seeking to elicit relevant truth in the interest of substantial

justice should not be narrowly curtailed. See Spaeth v. United States, 232 F. 2d 776 (6th Cir. 1956); Villaroman v. United States, 87 U.S. App. D.C. 240, 184 F. 2d 261 (1950).

The Court should have permitted Appellant's questioning of the complainant. The jury may have then inferred that the officer's refusal to discuss the crime was because he was trying to hide some embarrassing facts from the appellant.

3. The Court Interposed Itself Into The Conduct Of The Trial To The Prejudice Of The Accused.

With respect to Point 3, appellant desires the Court to read the following pages of the transcript: Tr. 6-8, 19-20, 42-51, 89, inclusive.

The trial judge requested questions from appellant on voir dire. When appellant submitted a question regarding the weight to be given to the testimony of a police officer as compared to a defendant, the judge stated he considered it "irritating." (Tr. 6). It is conceded that the question finally submitted and rejected did not contain the phrase "merely because he is a police officer." This phrase was contained in very similar questions requested on voir dire and approved by this Court in two recent cases. Sellers v. United States, 106 U.S. App. D.C. 209, 210, 271 F. 2d 475, 476 (1959); Brown v. United States, 119 U.S. App. D.C. 203, 338 F. 2d 543 (1964).

Next, the trial judge threatened to continue the case and appoint new counsel after appellant requested a question regarding whether any juror would be prejudiced because the complainant was white and the defendants were Negro. (Tr. 8). Appellant withdrew the question rather than risk a delay in the trial. Questions regarding possible racial prejudice of a prospective juror have been permitted. See Aldridge v. United States, 283 U.S. 308 (1931); Frazier v. United States, 267 F. 2d 62 (2nd. Cir. 1959).

The interruption of appellant's opening argument was unwarranted. (Tr. 20, 21). The trial judge's admonition to counsel against the use of certain words was also prejudical to appellant. Appellant was entitled to offer all of the statements leading up to the alleged assault including the opprobrious epithets. The trial judge's subsequent lecture to counsel outside the presence of the jury indicated his further displeasure. (Tr. 42-51). His inference that counsel were attempting to interject a racial issue in the trial was unfair and unwarranted.

The trial judge's comments in his final instructions regarding the racial issue may have been misleading to the jury. The jury may have inferred that defense counsel had acted improperly in conducting their defense, and this may have been detrimental to appellant.

This Court stated in Young v. United States, U.S. App. D.C., 346 F. 2d 793 (1965), that a judge's continual and unwarranted

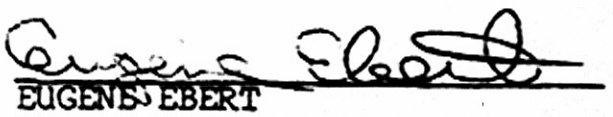
interruption and criticism of defense counsel may constitute prejudical error. It is submitted that the trial judge failed to employ the cautious restraint required by interposing himself into the conduct of the trial. As a result of this, appellant was prejudiced and denied a fair trial.

VII. CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be reversed and appellant's conviction of simple assault dismissed.

January 31, 1966

Respectfully submitted,



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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,689

JAMES H. KING, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court For The District of Columbia

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FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
THEODORE WIESEMAN,
Assistant United States Attorneys.

Cr. No. 64-65

QUESTIONS PRESENTED

1. Whether a jury that had been inadvertently discharged after rendering only part of its verdict could be recalled a short time later to announce the rest of its verdict?

2. Whether the trial judge prejudiced appellant by adverse comments, out of the hearing of the jury, on defense counsel's trial strategy; by instructing the jury that "racial overtones should not have crept into the evidence"; and by discouraging the use in open court of scurrilous racial epithets, which were not material to the trial?

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OTHER PREFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,689

JAMES H. KING, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court For The District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and co-defendant William McCorkle were charged in a one-count indictment filed February 1, 1965, with robbery by force and violence, in violation of 22 D.C. Code § 2901. After a jury trial, both defendants were acquitted of robbery but convicted of the lesser-included offense of simple assault, in violation of 22 D.C. Code § 504. On May 24, 1965, the court suspended imposition of sentence and placed appellant on probation for one year. Leave to appeal *in forma pauperis* was granted by the trial court.

Evidence for the Government

Ronald Wilkins, who had been a police officer for one month, was working undercover for the vice squad of the Tenth Precinct. His assignment was to gain entry to illegal liquor establishments—places selling liquor without a license or after closing hours—and to buy whiskey that could be used as evidence in later prosecutions. On November 23, 1964, Wilkins and another undercover officer started work about 11 p.m. After going to a cafe where Wilkins drank a beer, they tried to get inside several bootleg establishments but were unsuccessful each time. Finally, about 2:15 or 2:30 a.m. they were able to get inside an after-hours club at 1335 Columbia Road, N.W. (Tr. 23-26, 35, 52-54, 69).

When they entered the club, there was 20 or 25 customers inside, including appellant and co-defendant McCorkle. Officer Wilkins made his purchase, a bottle of whiskey, but after having mixed himself a drink and having left the bottle on a table, he returned to find it empty. He bought another bottle, put it in his pocket, and went outside alone. He had spent about fifteen minutes inside the club (Tr. 26, 35-36, 54-55, 67-69, 102-103, 114).[1]

When Officer Wilkins came outside, appellant and McCorkle were already on the street. They walked over, and appellant asked Wilkins if he would like a drink. Wilkins said no. Appellant repeated his offer, and this

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[1] Citing the testimony of the bartender that Officer Wilkins came into the club about midnight and left about 2:00 a.m., appellant argued to the jury that since Wilkins had spent two hours in the club, he left in an intoxicated condition. The bartender, however, retracted this testimony later, agreeing that possibly Wilkins did not enter until after 2:00 a.m. The record indicates that the bartender, to whom Wilkins was but one of 20 or 25 customers that night, was in fact mistaken in his original testimony; for the bartender also testified that appellant and co-defendant McCorkle came in about 1:00 or 1:30 a.m. and stayed about 45 minutes, while appellant testified that he was inside the club when Wilkins entered. Moreover, both Wilkins and the bartender agreed that Wilkins was sober when he left (Tr. 60, 94, 100, 102-103, 114, 168-170).

time Wilkins asked if they knew where there was another after-hours club (Tr. 26-27). Appellant said, "Yes, across the street" (Tr. 27).

As the three men walked across the street, a fourth man joined them, and they all walked through the basement door of 1354 Columbia Road, N.W. into a long hallway with a door at the far end. They stopped in the hallway and passed around Wilkins' bottle of whiskey and a bottle of wine that the other three men produced. After chatting about five or ten minutes, the subject turned to integration. Officer Wilkins was white and the other three were colored (Tr. 26-29, 37-39, 55-57). Appellant "said something about a 'white M.F.'", and repeated the remark two or three times (Tr. 29-30). Then, according to Officer Wilkins, the following occurred (Tr. 59):

> I said I realize that there is good and bad in all, and they said—I said I realize some Negroes, and as soon as I said that [appellant] said don't call me a Nigger, and I said, sait [*sic*] a minute, buddy. I said I didn't say that. And then he said it again and that is when they started beating on me.

First, appellant hit Officer Wilkins on the forehead, and then all three men beat and kicked him into unconsciousness. When Wilkins awoke, his attackers had disappeared. Also missing were his police slap-jack and his wallet, containing $20. His jaw had been fractured on both the left and right sides, he had cuts and bruises on his face, and he spent five days in the hospital (Tr. 31-33, 74-75).

Later, appellant and McCorkle returned to the after-hours club at 1335 Columbia Road. McCorkle stood to one side rubbing his hands while appellant borrowed some salt from the bartender. When McCorkle was in the bathroom with the salt, appellant walked over to the bar and asked the bartender if he were a policeman (Tr. 84-89).[2] After the bartender answered, "No," appellant en-

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[2] Officer Wilkins also had a police badge in his pocket, which was still there when he regained consciousness (Tr. 65).

trusted him with Officer Wilkins' slap-jack. Appellant said that "he had got into a fight," that "he just had to kick the MF," and that "he didn't need the blackjack, that he had his ring." (Tr. 89-90).

Evidence for the Defense

Appellant's evidence differed from that of the government. He testified that he had never seen McCorkle before the incident and that, contrary to the testimony of the bartender, he had not been in the after-hours club with McCorkle earlier that evening. He testified that Officer Wilkins came out of the club drunk and offered a drink to them. They went into the basement and drank for more than thirty minutes (Tr. 113-118). Then the following occurred (Tr. 118-119):

> Well, [Wilkins] asked me could I get him one of those Nigger whores out of 1335. I told him he know much about those people as I did, if you wanted one, get him hisself. And Willie McCorkle spoke up and says, you all shouldn't be talking that kind of talk. The officer says, what the hell is that Nigger got to do with it? . . . Mr. McCorkle steped around me and the officer pushed him and they started swinging on each other. Officer Wilkins went up against the wall beside of the door and fell . . . . The officer swung on Willie first.

Then, according to appellant, he walked away—pushing Officer Wilkins, who was blocking his way, aside and following McCorkle up the steps and out the door. No one but McCorkle hit Wilkins, who was conscious and followed them out. As appellant walked up the steps, he picked up the slap-jack, lying on the floor, that he later entrusted to the bartender. Finally, appellant testified that he never made the remarks attributed to him by the bartender; that he never hit Officer Wilkins; and that another police officer, who testified that he had arrested appellant on a warrant, was not with the police officers who arrested him (Tr. 108, 119-121, 124-130, 133-134).

Codefendant McCorkle testified that he had hit Officer Wilkins only once—and then not on the jaw. He said that appellant "probably struck [Wilkins] once." McCorkle did not actually see appellant hit Wilkins, but appellant "could have been hitting him" because appellant was "in the motions" (Tr. 147, 149-150).

Verdict

After instructing the jury on both robbery and simple assault, the court said to return for each defendant one of three verdicts: "guilty of robbery as charged; or guilty of simple assault, which is a lesser offense; or not guilty" (Tr. 201-202). The jury, however, announced a different verdict. The jury foreman said that each defendant was "not guilty of robbery." The deputy clerk repeated the verdict in open court as "not guilty." (Tr. 205). Then the record shows the following (Tr. 205):

> THE COURT: You may dismiss the jury.
>
> THE DEPUTY CLERK: Members of the jury, you may get your belongings in the jury room and return to the Clerk in the jurors lounge. Each of you report to the Clerk, please.
>
> (The jury left the courtroom.)
>
> THE COURT: Will counsel come to the bench, please.

At the bench, government counsel urged that the jury had acquitted the defendants only of robbery and had not received an opportunity to announce a verdict on simple assault (Tr. 205-207). After a short discussion at the bench, the record reads (Tr. 207):

> THE DEPUTY CLERK: Do you want them brought back? I will call right away.
>
> THE COURT: Yes, let the jury be brought back.
>
> MR. CAPUTY: Because I don't know whether it's complete or not.
>
> (IN OPEN COURT:)
>
> THE DEPUTY CLERK: They are coming right back, Your Honor.

(Following a pause, the jury and the defendants returned to the courtroom and resumed their respective places.)[3]

The court asked the foreman to repeat the verdict (Tr. 207-208):

THE FOREMAN: The verdict on robbery on King, not guilty of robbery; McCorkle, not guilty of robbery.

THE COURT: Well, the difficulty is that the Court submitted to you an alternative, namely, that you had a right to find—well, the Court told you that you had a right to find any one of three verdicts: Either guilty of robbery, or guilty of simple assault, or not guilty.

Now, your verdict isn't just not guilty, it is not guilty of robbery. What about the simple assault?

THE FOREMAN: But guilty of the simple assault, Your Honor.

The court instructed the deputy clerk to poll the jury, and after the poll, the jury was dismissed (Tr. 208-209). The only verdict ever recorded was guilty of simple assault.[4]

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[3] Appellant's brief suggests that the jurors were gone about ten or fifteen minutes and that, during the interim, the court called the next case on the calendar (App. Br. 3-4). Nothing in the record indicates that the court called another case, and we understand that counsel approached the bench immediately after the dismissal of the jury (see Tr. 205). Concerning how long the jurors were absent, the record is silent; nevertheless, we accept appellant's estimate as substantially correct. The absence was short, for the bench conference used only two pages of the transcript. At the end of the conference the deputy clerk reported that the jury was returning to the courtroom, and after a "pause" the jurors resumed their seats (Tr. 205-207).

[4] In this jurisdiction a verdict is recorded in three instances: (1) at the conclusion of the trial, the court clerk enters the verdict on the Court Clerk's Memorandum, called the criminal jacket; (2) the jacket entry is later transferred to the docket entries; and (3) at the end of each trial day, the court clerk submits a typewritten summary of the proceedings. Each of these documents is part of the record before this Court, and each reports the verdict as guilty of simple assault.

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 504, provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

SUMMARY OF ARGUMENT

The trial court inadvertently discharged the jury before it had rendered its entire verdict but, perceiving the error, immediately recalled the jurors to the courtroom and received the rest of the verdict. At most, a procedural irregularity occurred that did not prejudice any substantial rights. In addition, the court's order discharging the jury in the first instance was invalid and without legal force. In these circumstances, it is clear that appellant was not placed twice in jeopardy.

Any adverse comment by the trial judge on defense counsels' trial tactics occurred out of the presence of the jury. The court properly instructed the jurors to disregard any racial overtones that may have appeared at the beginning of the trial. Appellant's defense was not restricted in the slightest by the court's efforts to discourage the use in open court of opprobrious racial epithets that were not pertinent at the trial.

ARGUMENT

I. An irregularity in receiving the jury verdict, which was promptly corrected, did not void appellant's conviction.

(Tr. 201-209)

Contrary to appellant's contention (Br. 7-12), his conviction was not void because an oversight resulted in an irregularity in the manner in which the jury verdict was received. As the record shows (Tr. 201-209), the jury

foreman, because either inattentive or forgetful, did not follow the trial court's instructions to return a verdict of guilty of robbery, guilty of simple assault, or not guilty. Instead, the foreman began by saying "not guilty of robbery." The deputy clerk, not expecting the verdict in that form, misunderstood the foreman and repeated the verdict as "not guilty." The trial judge, relying on the deputy clerk, dismissed the jury. Consequently, the jury foreman never had an opportunity to render the verdict on simple assault. The oversight was called to the trial judge's attention immediately. As soon as the facts were made clear, the court dispatched instructions to bring the jurors back to the courtroom, and they returned promptly. The foreman announced that the verdict on simple assault was guilty, and the clerk polled the jury. The incomplete verdict, not guilty of robbery, was never recorded on any court papers.

There is no question that the guilty verdict was the true verdict of the jurors, which they intended to return in the first instance. Appellant does not, and could not on this record, contend otherwise. The error was a human one, the kind that inevitably arises on occasion in all endeavors, and it was remedied forthwith.

This irregularity, since it in no way affected the sanctity of the jury's deliberations and in no way prejudiced appellant, was harmless error. F.R. Crim. P. 52(a). In quite similar circumstances—where a trial judge, believing by mistake that an accused had not pleaded to the indictment, discharged an impanelled jury, arraigned the accused, and then swore the same jury again without conducting a new *voir dire*—the Supreme Court held that "under the circumstances there was in the best possible view for the accused a mere irregularity of procedure which deprived him of no right." *Lovato* v. *New Mexico*, 242 U.S. 199, 201 (1916).[5] Similar cases, though few in number, unanimously agree with the result reached in

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[5] In *Lovato*, since the trial had occurred in a territorial court, the Supreme Court applied federal standards in reviewing the conviction. 242 U.S. at 201.

Lovato.[6] The Court properly recalled the jury to finish rendering its verdict instead of ordering a new trial.[7]

Moreover, not only was the error harmless, but also the first announcement of the verdict had no legal effect. The trial court had no authority to discharge the jury before the entire verdict had been rendered. It is well settled that an invalid judgment of conviction is without any force and can be replaced at any time by one that is valid. *E.g.*, *Hayes* v. *United States*, 102 U.S. App. D.C. 1, 249 F.2d 516 (1957), *cert. denied*, 356 U.S. 914 (1958). Similarly, in this case the trial judge's discharge of the jury was a void order and did not preclude recalling the jury to render its true verdict.

Appellant misplaces his reliance (App. Br. 8-11) on the authorities holding that after the jurors have been discharged and have left the courtroom, the court cannot recall them to *deliberate* further on the case. These cases make it clear that the basis of the rule is that further deliberations might be contaminated by contacts and conversations between jurors and outsiders after the dis-

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[6] *Bozza* v. *United States*, 330 U.S. 160, 165 (1947), involving an increase of sentence after accused had spent five hours in federal detention jail under an earlier, invalid sentence; *Kennedy* v. *Reid*, 101 U.S. App. D.C. 400, 249 F.2d 492 (1957), where a clerical error in the judgment of conviction resulted in accused's premature release from the penitentiary and where sentencing court corrected the error and returned accused to penitentiary; *Rowley* v. *Welch*, 72 App. D.C. 351, 114 F.2d 499 (1940), where after inadvertently pronouncing concurrent sentences, court recalled accused from custody and imposed consecutive sentences; *Anderson* v. *United States*, 294 Fed. 593, 597 (2d Cir. 1923), where jury filed sealed verdict with clerk, separated and went home, and the next morning in open court changed verdict from guilty on counts one and two, as stated in sealed verdict, to guilty on counts three and four, which was the jury's original intention before separation; *Regina* v. *Vodden*, 6 Cox Crim. Cas. 226, 22 Eng. Rep. Law & Eq. 596 (Ct. Crim. App. 1853), in which court had discharged prisoner and clerk had entered not guilty verdict in minute book before discovery that jury foreman meant to say guilty instead of not guilty.

[7] *Lovato* v. *United States*, *supra* at 202; see *Summers* v. *United States*, 11 F.2d 583 (4th Cir.), *cert. denied*, 271 U.S. 681 (1926); *Anderson* v. *United States*, *supra*; *Regina* v. *Vodden*, *supra*.

charge.[8] *E.g.*, *Ellis* v. *State*, 27 Tex. App. 190, 11 S.W. 111 (Ct. Crim. App. 1889). However, in the instant case, the discharge did not affect the verdict because the jurors did not deliberate a second time; they merely returned and finished announcing the verdict that they had arrived at before the discharge. Finally, appellant's contention that the court lost jurisdiction to recall the jurors and the defendants minutes after the discharge is groundless.[9]

Appellant suggests that the double jeopardy clause applies and asks this Court to dismiss the simple assault conviction (App. Br. 11, 15). This suggestion, however, is entirely without merit; for the double jeopardy clause does not apply to "a mere irregularity of procedure," *Lovato* v. *United States*, *supra* at 201; or where an invalid order is replaced by a valid one, *e.g.*, *Hayes* v. *United States*, *supra;* or where the jury was discharged without reaching a verdict because of "unforeseeable circumstances," *e.g.*, *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).[10] Applicable to this case is Mr. Justice Black's

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[8] In any event, these cases are vestiges of an older rule still existing in the nineteenth century that prohibited the jury from separating at any time during deliberation in a felony case. See 3 Blackstone, *Commentaries* 377-378; 4 Blackstone, *id.* 360. Under the modern rule, jurors may separate during their deliberations, *e.g.*, *Brown* v. *United States*, 69 App. D.C. 96, 99 F.2d 131, *cert. denied*, 305 U.S. 562 (1938). Communications between jurors and outsiders will not be grounds for reversal unless actual prejudice is shown *e.g.*, *Ryan* v. *United States*, 89 U.S. App. D.C. 328, 191 F.2d 779 (1951), *cert. denied*, 342 U.S. 928 (1952); or unless the contacts are so lasting and so deep as to be inherently prejudicial, *Turner* v. *Louisiana*, 379 U.S. 466 (1965).

[9] See *Crawford* v. *United States*, 109 U.S. App. D.C. 219, 285 F.2d 661 (1960); *Kennedy* v. *Reid*, *supra;* *Stirone* v. *United States*, 341 F.2d 253, 257 (3d. Cir.), *cert. denied*, 381 U.S. 902 (1965) (concurring opinion). Compare *Michigan Trust Co.* v. *Ferry*, 228 U.S. 346 (1913), with *New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (1916).

[10] See also cases cited in footnote 6, *supra*, and Note, *Double Jeopardy: The Reprosecution Problem*, 77 Harv. L. Rev. 1272, 1277 (1964).

Nothing in *Green* v. *United States*, 355 U.S. 184 (1957), where a conviction of second degree murder was held to bar a conviction

observation in *Bozza* v. *United States*, *supra* at 166-167:

> The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.[11]

II. The trial judge did not conduct the trial to the prejudice of appellant.

(Tr. 6-9, 18-21, 42-52, 118, 146-147, 163-164, 186-190, 202-203)

There is no merit to appellant's contention that he was prejudiced by improper comments and rulings by the trial judge (App. Br. 13-15). At the beginning of the trial, out of the hearing of the jury, the Court strongly disapproved appellant's request that the jurors be asked on the *voir dire* examination whether they would be prejudiced by the races of the complainant and the defendant. Appellant's counsel immediately withdrew the question (Tr. 8). Later, while making his opening statement to the jury, appellant's counsel said that he would

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of first degree murder at a later trial, supports appellant's contention that "the jury's original finding of not guilty of robbery constituted an acquittal also on the lesser offense of simple assault" (App. Br. 11). That argument not only was rejected in *Forsberg* v. *United States*, 351 F.2d 242 (9th Cir. 1965), but also violates the language of the *Green* opinion which expressly disavowed the notion that double jeopardy turned on such a legal fiction (355 U.S. at 190-191):

> But the result is this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. *Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.* Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. *Wade* v. *Hunter*, 336 U.S. 684. (Emphasis supplied).

[11] This statement was taken from the opinion of Judge Edgerton in *King* v. *United States*, 69 App. D.C. 10, 15, 98 F.2d 291, 296 (1938).

show that the complaint had provoked the defendants by using the term "nigger." After waiting until counsel had gone on to another matter, the court called counsel to the bench, vigorously expressed displeasure with what he suspected to be the trial strategy, and told counsel not to use the term again (Tr. 18-21).

On the second day of trial, before the jury entered, the trial judge had a lengthy discussion with counsel, during which the judge expressed his "chagrined" reaction to "an attempt, perhaps inadvertent, to inject a racial issue" into the trial (Tr. 42). The necessity of using the scurrilous term was discussed by both the court and counsel in detail (Tr. 42-47). When codefendant McCorkle's counsel urged that the defense's theory was that the assault had been provoked by the complainant's alleged use of the opprobrious epithet, the court pointed out that the theory was legally insufficient, for "an opprobrious epithet, no matter how opprobrious, does not justify a blow" (Tr. 47).[12] At the end of the discussion, the court again expressed its opinion that the opporbrious term was immaterial, but did not prohibit the defense from using it. Instead, the court said, "I suggest that you tread gingerly on the other matters. *That is as far as I can go or shall go*" (Tr. 51) (emphasis supplied). Keeping his word, the judge later allowed both appellant and co-defendant McCorkle to use the terms freely in their testimony (Tr. 118, 146-147).

No further mention of the subject occurred until the conclusion of the case, when the court told counsel at the bench (Tr. 163):

> THE COURT: I suggest, if I may, that in the summing up no reference be made to the racial overtones that crept in in the early stages of the trial. I am going to refer to the matter very briefly and admonish the jury concerning it in a mild way and as tactful a way as I am capable of.

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[12] The court was entirely correct, for "mere words, no matter how abusive, insulting, vexatious or threatening they may be, will not justify an assault or battery." *Eagleston* v. *United States*, 172 F.2d 194, 199 (9th Cir.), *cert. denied*, 336 U.S. 952 (1959).

The court instructed the jury as follows (Tr. 189-190):

> I am going to say a word about something that happened at this trial, a matter concerning which I have never had occasion to refer in all my instructions to the jury during my many years on the bench, but I feel that I must do so here. Unfortunately, something crept into this case at the early stages of this trial concerning the fact that the defendants and the victim are of different races. Such racial overtones should not have crept into the evidence. No consideration must be paid to the race, color, religion or nationality of anyone who comes before this Court, be that person a defendant or be he the victim of a crime. Such matters must not enter into consideration of any case, directly or indirectly. In fact, I am sure that you are above such influences, and I know I am. To permit these matters to enter or influence or affect the decision of a case would be violative of our oaths. You would be violating your oath, I would be violating mine, if I permitted such matters to enter into consideration of a case of if you permitted them to do so. In fact, I may say that if such matters affected the decision of cases in court, then all that has been done for civil rights has gone for naught.

The trial court's comments, though strong on occasion, did not carry the sting that appellant reads into them, and since all the comments, except the jury instructions, occurred out of the hearing of the jurors, appellant was not prejudiced. The jury instructions were proper in all respects and could not have been construed by the jurors, who had no knowledge of what had occurred at the bench, as attributing any misconduct to defense counsel. Appellant's defense was not affected in any way, for the scurrilous epithets, although legally immaterial to the issues on trial, were used in the opening statement, used in both defendants' testimony, and could have been used in closing argument.[13]

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[13] Appellant also contends (App. Br. 12-13) that the Court improperly excluded evidence that the complaining witness, Officer

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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Wilkins, would not discuss the case with defense counsel before trial (Tr. 60-62). Since a witness is not obligated to reveal his testimony to opposing counsel before trial, Officer Wilkins' action did not show bias or bear any relevance to the issue of appellant's guilt or innocence.

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